BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES E. GOUVION Claimant	)	
VS.	)	
TMC TRANSPORTATION Respondent	)	Docket No. 1,054,621
AND	)	
NEW HAMPSHIRE INSURANCE COMPANY Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) appealed the August 2, 2011, preliminary hearing Order for Compensation (Order) entered by Administrative Law Judge (ALJ) Brad E. Avery. Claimant appeared by William L. Phalen, of Pittsburg, Kansas. Eric T. Lanham, of Kansas City, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 29, 2011, preliminary hearing and exhibits; the transcript of the June 29, 2011, deposition of Martha Grice and exhibits; and all pleadings contained in the administrative file.

Claimant was a truck driver employed by respondent. He alleges he injured his back on February 13, 2011, while checking a tarp on a truck he drove for respondent. At the time, the truck was located near his home in Arma, Kansas. The next day, claimant proceeded to drive the truck to Dallas, Texas. Claimant testified that he stopped at Baxter Springs, Kansas, after traveling only 40 miles. His back had become worse from the bumps in the road and vibration of the truck. He called his dispatcher and informed the dispatcher of the injury. Claimant then proceeded to Joplin, Missouri. There he signed a document entitled "Separation Notice," which stated that he was unable to lift or carry tarps due to a previous back injury four years ago. Three days later, claimant filed a written claim for workers compensation.

Respondent asserts three defenses. First, respondent admits that if claimant is alleging a single traumatic injury on or about February 14, 2011, at Arma, Kansas, there is jurisdiction under the Kansas Workers Compensation Act (Act). However, if claimant is alleging a repetitive injury, there is no jurisdiction under the Act. Second, respondent asserts the ALJ erred in finding claimant's injury arose out of and in the course of employment with respondent. Third, respondent contends claimant did not give timely notice of the accident.

In the August 2, 2011, Order, the ALJ found that claimant suffered a personal injury by accident arising out of and in the course of his employment, but did not specify a date of injury. He also determined that claimant gave timely notice of the accident and provided timely written claim. The ALJ ordered temporary total disability benefits to be paid at the rate of $335.86 per week commencing February 14, 2011, until claimant reaches maximum medical improvement or returns to gainful employment, whichever occurs first. This infers that the ALJ determined claimant's date of accident was February 13, 2011. Finally, the ALJ ordered respondent and its insurance carrier to pay for claimant's medical treatment and authorized Dr. Do as claimant's treating physician.

ISSUES

1. Is there jurisdiction under the Kansas Workers Compensation Act? Specifically, did claimant suffer a single traumatic injury in the state of Kansas or a series of repetitive injuries? Respondent concedes there is jurisdiction under the Act if claimant was injured in a single traumatic accident in Kansas on or about February 14, 2011.

2. Did claimant suffer a personal injury by accident arising out of and in the course of his employment with respondent?

3. Did claimant give respondent timely notice of the accident?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant began working for respondent on January 7, 2011. He was a truck driver who worked out of his home at Arma, Kansas. His dispatcher was in Iowa. Claimant drove a truck owned by respondent. When not in use the truck was parked on a vacant lot, approved by respondent, near claimant's home. A dispatcher for respondent would inform claimant of his travel assignments. Claimant would normally leave on Sunday or Monday and return home on Friday or Saturday.

Claimant testified as to his version of the accident and subsequent events. Before claimant began each trip, he was required to retarp the load for safety purposes. On

Sunday, February 13, 2011, claimant was retarping the load when he felt his back go out and he went to his knees. He sat for a while and after the pain did not go away, he finished retarping the load.

The next morning (February 14, 2011) claimant departed in the truck for Dallas, Texas. His back was hurting and the vibration of the truck and bumps in the road made it hurt worse. His legs started to get numb, so he stopped at Baxter Springs and called his dispatcher. Claimant testified he was told by the dispatcher to call the safety director. Claimant then called Martha Grice, whom he thought was the safety director. He told Ms. Grice about the February 13, 2011, incident. Claimant testified he told Ms. Grice the time the incident occurred, what he was doing, where the incident occurred, and that he injured his back. Claimant informed Ms. Grice the injury made it unsafe for him to drive. Ms. Grice instructed claimant to call the nearest facility in Joplin, Missouri.

Claimant then called respondent's Joplin, Missouri, facility and spoke to Terry Fitzgerald, respondent's safety manager. He told Mr. Fitzgerald how the injury occurred, but not the date and time of the injury. Mr. Fitzgerald asked claimant to drive to respondent's facility at Joplin. There, claimant met Mr. Fitzgerald. Claimant testified Mr. Fitzgerald requested claimant sign a separation notice indicating claimant voluntarily quit. Mr. Fitzgerald printed on the separation notice that claimant was unable to lift or carry tarps due to a previous back injury four years ago and that claimant voluntarily quit. Claimant printed on the separation notice that he was unable to lift or carry tarps. Claimant testified he was told by Mr. Fitzgerald to have a nice day. Then Mr. Fitzgerald walked out of the room. Claimant then called his wife, who came and took him home.

Mr. Fitzgerald's recollection of events is somewhat different. He testified claimant never called him. Claimant showed up at the Joplin facility on February 14, 2011, and said he was there to resign his employment. Prior to that meeting, Mr. Fitzgerald had never met claimant. According to Mr. Fitzgerald, claimant did not tell him about a work-related accident that occurred the day before. Mr. Fitzgerald completed the section of the separation notice entitled "What was the final circumstance leading to separation?" Mr. Fitzgerald testified he put down what claimant told him, which was, "Unable to lift or carry tarps due to previous back injury four years ago."[1] Claimant then completed the section entitled "Employee's Comments" with "Unable to lift or carry tarps."[2]

Mr. Fitzgerald then sent Martha Grice an e-mail with an attached letter indicating claimant had resigned. Mr. Fitzgerald testified that Ms. Grice is not the safety director, but rather is the workers compensation claims manager. He indicated that ordinarily he did not notify Ms. Grice every time an employee voluntarily quit. However, because claimant

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[1] P.H. Trans., Cl. Ex. 2.

[2] *Id.*

indicated he could no longer do the tarp work, Mr. Fitzgerald sent the e-mail and letter to Ms. Grice as a courtesy. Mr. Fitzgerald also testified that the day after claimant resigned, claimant returned and asked for the separation notice back.

Martha Grice also testified. She indicated she was the workers compensation claims manager for respondent. Ms. Grice stated that in addition to serving as the workers compensation claims manager, she also held a position in the federal compliance department. Her duties in the federal compliance department required her to make sure all drivers are physically qualified to operate respondent's equipment.

Ms. Grice testified that on February 14, 2011, claimant called her. She does not know how claimant obtained her telephone number. Ms. Grice started a log on the incident and made an entry summarizing her telephone conversation with claimant. Ms. Grice does not open a workers compensation file on each worker, but does keep a log of telephone calls, doctor's appointments and other events. The heading on the log she started on claimant states "Workers' Compensation NOTES."[3] Ms. Grice testified the heading is computer generated. Ms. Grice testified she did not consider this a workers compensation case despite the heading on the log.

The log entry on February 14, 2011, at 8:13 a.m. indicates that claimant called Ms. Grice and said he had crushed low back vertebrae as a result of an accident four years ago. The entry states claimant ". . . isn't going to be able to do this job" and his wife was on the way to Joplin.[4] Ms. Grice testified that during the telephone conversation she told claimant to see Terry Fitzgerald, but did not tell claimant to go to respondent's location in Joplin. Ms. Grice testified that during the telephone call, claimant never indicated he had suffered a work-related back injury while working for respondent.

A 9:44 a.m. log entry made by Ms. Grice on February 14, 2011, states she received the separation notice. On February 23, 2011, an entry was made in the log indicating claimant had filed a workers compensation claim. At no time did Ms. Grice investigate the matter.

After the incident, claimant did not seek medical treatment. Claimant filed an application for hearing on February 18, 2011. He listed the date of accident as on or about February 14, 2011, and the cause of the accident as "Performing the duties of a semi-truck driver including Strapping, unstrapping, tarping and untarping loads."[5]

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[3] Grice Depo., Ex. 1.

[4] *Id.*

[5] Application for Hearing (filed Feb. 18, 2011).

Claimant's attorney referred claimant to Dr. George G. Fluter. Dr. Fluter saw claimant on March 10, 2011. He was the first physician claimant saw after the incident. Dr. Fluter obtained a history from claimant and physically examined claimant. Claimant told Dr. Fluter about injuries he suffered in a rollover accident that occurred four years earlier. Claimant injured his neck, lower back, left hip and left knee. After that accident, claimant used a soft knee brace for a few weeks. Claimant returned to work with no permanent restrictions. Claimant reported no other injuries in the interim.

The history Dr. Fluter obtained from claimant does not mention an accident on February 13, 2011. The history described how claimant would put tarps on the loads on a repetitive basis. Claimant reported that two weeks prior to February 14, 2011, claimant began experiencing pain affecting the neck, back, upper extremities and lower extremities. His right and left toes also began to tingle and become numb. The history infers claimant suffered a repetitive, rather than a traumatic, injury.

Dr. Fluter did not review any of claimant's medical records or radiographic studies from claimant's previous accident. Dr. Fluter did not conduct any diagnostic tests, but did recommend claimant undergo x-rays, MRIs and EMGs. His assessment was: bilateral upper extremity pain/dysesthesia; bilateral lower extremity pain/dysesthesia; neck/upper back, middle back and lower back pain; and bilateral shoulder pain/impingement. He also imposed significant restrictions on claimant. Dr. Fluter indicated there was a causative link between claimant's work duties and his medical condition.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[6] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[7]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the

[6] K.S.A. 2010 Supp. 44-501(a).

[7] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

> nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[8]

K.S.A. 2010 Supp. 44-501(a) in part states: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2010 Supp. 44-508(d) in part states:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

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[8] *Id.*, at 278.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[10]

ANALYSIS

Claimant is alleging a single traumatic accident. He testified that he injured his back while retarping his load on February 13, 2011, in Arma, Kansas. The application for hearing filed by claimant indicates claimant was injured on or about February 14, 2011. Only Dr. Fluter's report mentions a repetitive injury. Therefore, this Board Member finds the date of accident is February 13, 2011, and that the accident occurred in Kansas. Accordingly, there is jurisdiction under the Kansas Workers Compensation Act.

Apparently, the ALJ found claimant's version of events credible. He concluded claimant suffered a personal injury by accident arising out of and in the course of employment with respondent. Here, the ALJ had the opportunity to assess claimant's testimony. Some deference may be given to an ALJ's findings and conclusions concerning credibility where the ALJ personally observed the testimony. Based upon the evidence presented, the ALJ concluded claimant presented sufficient evidence to prove his injury arose out of and in the course of his employment.

As the Kansas Court of Appeals noted in *De La Luz Guzman-Lepe*,[11] appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the fact finder. "One of the reasons that appellate courts do not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful."[12] This Board Member finds that by the barest of margins claimant has met his burden of proof that he met with personal injury by accident arising out of and in the course of his employment with respondent.

Respondent asserts claimant did not provide adequate notice as required by K.S.A. 44-520. The ALJ found claimant gave proper and timely notice because claimant filed a written claim and application for hearing within 10 days after the accident. Respondent

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[9] K.S.A. 44-534a.

[10] K.S.A. 2010 Supp. 44-555c(k).

[11] *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

[12] *State v. Scaife*, 286 Kan. 614, 624, 186 P.3d 755 (2008).

argues that although notice was timely, it did not meet the other requirements of K.S.A. 44-520. Respondent argues the written claim failed to provide adequate notice of the time, place and particulars of the injury.

Claimant asserts he gave oral and written notice of the accident. Claimant testified that on February 14, 2011, he told the dispatcher and Ms. Grice that he injured himself on February 13, 2011, in Arma, Kansas, while retarping his load. The application for hearing states the accident took place on or about February 14, 2011, while "Performing the duties of a semi-truck driver including Strapping, unstrapping, tarping and untarping loads." The application lists Arma, Crawford County, Kansas as the situs of the accident. This Board Member finds claimant has met the requirements of K.S.A. 44-520. Claimant orally and in writing gave notice within 10 days of the accident and provided information as to the time of the accident, the location of the accident and sufficient particulars of the accident.

CONCLUSION

1. Claimant's date of accident was February 13, 2011. His accident occurred in Arma, Kansas. Therefore, jurisdiction exists under the Kansas Workers Compensation Act.

2. Claimant met with personal injury on February 13, 2011, by accident arising out of and in the course of his employment with respondent.

3. Claimant gave timely and proper notice of the accident as required by K.S.A. 44-520.

WHEREFORE, the undersigned Board Member affirms the August 2, 2011, preliminary hearing Order for Compensation entered by ALJ Avery by finding claimant suffered personal injury by accident in Arma, Kansas, on February 13, 2011.

IT IS SO ORDERED.

Dated this ____ day of October, 2011.

THOMAS D. ARNHOLD
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Eric T. Lanham, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge